

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 28 July 2005

BALCA Case No.: 2004-INA-00356
ETA Case No.: P2003-NY-02501098

In the Matter of:

ALL PURPOSE LOCKSMITH, INC.,
Employer,

on behalf of

MUHAMMAD NAWAZ,
Alien.

Appearance: Jed David Philwin
110 Wall Street, Floor 21
New York, New York 10005
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (hereinafter "CO") of its application for alien labor certification. Permanent alien labor certification is governed by section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations, 20 C.F.R. Part 656.¹ We base our decision on the record upon which the

¹ This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

CO denied certification and the Employer's request for review, as contained in the appeal file (hereinafter "AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed for labor certification on behalf of the Alien to fill the position of Locksmith. (AF 37). The only job requirement listed called for two years of experience in the job offered. (AF 37). The job to be performed was described as installing or repairing mechanical or electrical locks, using hand and machine tools. (AF 37).

On April 12, 2004, the CO issued a Notice of Findings (hereinafter "NOF") proposing to deny certification pursuant to 20 C.F.R. § 656.20(c)(8), which requires an employer to document that the "job opportunity has been and is clearly open to any qualified U.S. worker." (AF 26). In the NOF, the CO stated that a search using the business name and then the business address provided in the labor certification application failed to yield any listing for the business. (AF 26). Accordingly, the CO directed the Employer to document the existence of the business by submitting a copy of the articles of incorporation for the business, a current lease, recent phone bills, the business's federal tax returns for years 2000 through 2002, the job titles and daily schedules of each employee, and copies of all employees' W-2 forms for the years 2001 through 2003. (AF 26). In addition, the CO denied the Employer's request for Reduction in Recruitment processing, stating that the supplied Xerox copy of an ad imprinted on a copy of an Affidavit of Publication from Clover Mill Associates, Inc., along with the Employer's counsel's statement that there was no response to the ad was "unacceptable." (AF 26). The CO then requested additional documentation showing that the job offered was advertised within the last six months, along with documentation establishing compliance with 20 C.F.R. § 656.20(g)(1), which instructs an employer to post notice of the labor certification application at the facility or location of the employment. (AF 26-27).

The Employer's signed rebuttal is dated June 28, 2004. (AF 11-24). The Employer provided personal federal income tax returns for 2001 and 2002, including Schedule C forms showing income and expenses for All Purpose Locksmith. A signed cover letter stating that four locksmiths are presently employed by the Employer was submitted. However, the Employer submitted no W-2 forms or documentation showing the name, job title, or work schedule of the employees. (AF 11). None of the other documentation requested in the NOF was provided.

The CO issued a Final Determination (hereinafter "FD") denying labor certification on July 13, 2004. (AF 10). The CO found that the Employer had failed to document that a bona fide offer of permanent employment exists, as is required under 20 C.F.R. § 656.20(c)(8). (AF 166). Although tax returns for 2001 and 2002 were provided, the CO noted that the Employer failed to provide the requested work schedules or W-2 forms for any of the four locksmiths the Employer claimed to employ. In view of these deficiencies, the CO denied the application.

The Employer submitted a letter of appeal dated August 12, 2004. (AF 1). In the letter, the Employer described the work schedules for the four locksmiths, but declined to provide any W-2 forms documenting wage or salary payments to the locksmiths. The case was docketed by the Board on September 15, 2004.

DISCUSSION

An employer must show that the job opportunity has been and is open and available to qualified U.S. workers. 20 C.F.R. § 656.20(c)(8). This requirement gives rise to what has been termed the "bona fide job opportunity" test, wherein an employer may be required to provide documentation establishing the nature or status of the position or employer in question. *See Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. March 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Susan & Robert Hermanos*, 2002-INA-256 (Aug. 28, 2003). Certification may be denied on the ground that no bona fide job opportunity exists where the employer fails to provide documentation requested by the CO. *Britt's Antique Importers/Exporters*, 1990-INA-276 (Dec. 17, 1990). For example, upon a

request by the CO, a petitioner must provide a business license or other documentation to prove the existence of a viable business entity. *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *see also Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Aerial Topographic Maps*, 1994-INA-627 (Aug. 15, 1996). Thus, the employer bears the burden of proving that a position is permanent and full-time, and certification may be denied if the employer's own evidence fails on that point. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*). Furthermore, any evidence submitted after the issuance of the Final Determination, and along with the request for review, cannot be considered by the Board on appeal. 20 C.F.R. § 656.26(b)(4); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988).

After failing to confirm the Employer's existence and location using standard address and telephone inquiries, the CO directed the Employer to submit specific documentation, including a current lease, recent phone bills, business tax returns for years 2000 through 2002, the job title and daily schedule of each employee, and copies of W-2 forms for the years 2001 through 2003 for each employee, all of which are relevant to whether a bona fide opportunity exists, and are reasonably obtainable. Nonetheless, the Employer provided to the CO some, but not all, of the requested documents. In particular, no employee information showing the total number of employees along with job titles and W-2 forms was provided. As noted above, the information provided by the Employer in the letter of appeal cannot be considered by the Board on appeal.

Moreover, this application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.*, however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to meet its burden of documenting the existence of a bona fide job opportunity offered by an employer capable of funding the position identified in the application and the job announcement. The CO therefore properly denied certification.

ORDER

The CO's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs